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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM JOHN DAUGHERTY, CDCR) Civil No. 08cv0408-WQH (BLM)
#F-79985,)
v. Plaintiff,) **REPORT AND RECOMMENDATION FOR**
DENNIS WILSON, et al.,) **ORDER GRANTING DEFENDANTS CITY**
Defendants.) **OF SAN DIEGO AND SAN DIEGO**
) **POLICE DEPARTMENTS' MOTION TO**
) **DISMISS**
) **[Doc. No. 42]**
)

This Report and Recommendation is submitted to United States District Judge William Q. Hayes pursuant to 28 U.S.C. § 636(b) and Local Civil Rules 72.1(c) and 72.3(f) of the United States District Court for the Southern District of California.

On March 3, 2008, Plaintiff William John Daugherty, a state prisoner proceeding *pro se* and *in forma pauperis*, filed this civil rights suit against Defendants Wilson, Tagaban, Griffin and Lemus under 42 U.S.C. § 1983. Doc. No. 1. After having been granted leave to do so by the Court [Doc. No. 24], Plaintiff filed a First Amended Complaint ("FAC") on June 19, 2008, which added the City of San Diego and the San Diego Police Department as Defendants [Doc. No. 25].

1 On July 29, 2008, the City of San Diego and the San Diego
2 Police Department ("Defendants") filed a motion to dismiss the FAC
3 for failure to state a claim upon which relief may be granted. Doc.
4 No. 42 (pursuant to Fed. R. Civ. P. 12(b)(6)). Plaintiff timely
5 opposed the motion [Doc. No. 51] and Defendants filed a reply on
6 August 28, 2008 [Doc. No. 52]. Thereafter, Plaintiff filed two
7 documents [Doc. Nos. 54 & 56], which the Court construed as sur-
8 replies [Doc. Nos. 53 & 55].

9 This Court finds the issues appropriate for decision on the
10 papers and without oral argument pursuant to Local Civil Rule
11 7.1.(d)(1). See Doc. No. 49. The Court has considered the FAC,
12 Defendants' Motion to Dismiss, Plaintiff's Opposition, Defendants'
13 Reply, Plaintiff's "Answer to Defendants' Reply to Plaintiff's
14 Opposition to Motion to Dismiss First Amended Complaint" [Doc. No.
15 54], and Plaintiff's "Supplemental to Opposition to Motion to
16 Dismiss First Amended Complaint" [Doc. No. 56] and all supporting
17 documents submitted by the parties. For the reasons set forth
18 below, this Court **RECOMMENDS** that Defendants' Motion to Dismiss
19 [Doc. No. 42] be **GRANTED**.

BACKGROUND

21 In his Complaint, Plaintiff alleged that on March 9, 2006,
22 San Diego Police Officers Wilson and Tagaban used excessive force
23 prior to arresting him in violation of the Fourth and Fourteenth
24 Amendments. Doc. No. 1. He further alleged that San Diego Police
25 Sergeant Griffin and Detective Lemus were "integral participants" in
26 the allegedly unlawful beating because they witnessed it but did
27 nothing to intervene. Id. at 2, 4.

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1 In his FAC, filed on June 19, 2008, Plaintiff reasserts the
2 same claims against the four officers, verbatim, and adds an
3 additional cause of action, listed as "Count 5," against the City of
4 San Diego and the San Diego Police Department. FAC at 7. Under
5 Count 5, Plaintiff alleges that the City of San Diego and the San
6 Diego Police Department violated his Fourth Amendment rights and
7 committed the "state tort[s]" of "Gov't Code § 810 *et seq.*, assault
8 and battery P.C. 245 and negligence in failure to provide medical
9 assistance." Id. Plaintiff elaborates on this allegation,
10 explaining that "[b]oth the City of San Diego and the Police
11 Department are liable for injuries proximately caused by acts or
12 omissions of employees of public entities acting within scope of
13 their employment, if the acts or omissions would, apart from this
14 section, have given rise to a cause of action against those
15 employees." Id. (paraphrasing Government Code § 815.2). In other
16 words, Plaintiff claims that both entities are "vicariously liable
17 under the doctrine of *respondeat superior*" for the officers'
18 conduct. Id. Plaintiff asks the Court to invoke pendant
19 jurisdiction over his state claim. Id.

20 The City of San Diego and the San Diego Police Department now
21 move to dismiss the FAC. Doc. No. 42.

LEGAL STANDARD

23 A motion to dismiss under Rule 12(b)(6) of the Federal Rules
24 of Civil Procedure tests the legal sufficiency of the plaintiff's
25 claims. See Fed. R. Civ. P. 12(b)(6). In considering a Rule
26 12(b)(6) motion, "we do not require heightened fact pleading of
27 specifics, but only enough facts to state a claim to relief that is
28 plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S.Ct.

1 1955, 1974 (2007). "However, the court is not required to accept
 2 legal conclusions cast in the form of factual allegations if those
 3 conclusions cannot reasonably be drawn from the facts alleged."
 4 Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004)
 5 (quoting Cleqq v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th
 6 Cir. 1994)). The issue is not whether the plaintiff ultimately
 7 will prevail, but whether he has properly stated a claim upon which
 8 relief could be granted. Jackson v. Carey, 353 F.3d 750, 755 (9th
 9 Cir. 2003).

10 When the plaintiff is appearing *pro se*, the court must
 11 construe the pleadings liberally and afford the plaintiff any
 12 benefit of doubt. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir.
 13 2002) (citing Karim-Panahi v. Los Angeles Police Dept., 839 F.2d
 14 621, 623 (9th Cir. 1988)). This rule of liberal construction is
 15 "particularly important" in civil rights cases. Ferdik v. Bonzelet,
 16 963 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal
 17 interpretation to a *pro se* civil rights complaint the court is not,
 18 however, permitted to "supply essential elements of the claim that
 19 were not initially pled." Ivey v. Bd. of Regents of the Univ. of
 20 Alaska, 673 F.2d 266, 268 (9th Cir. 1982). "Vague and conclusory
 21 allegations of official participation in civil rights violations are
 22 not sufficient to withstand a motion to dismiss." Id.

23 If the court concludes that dismissal is appropriate, the
 24 court has discretion to dismiss the complaint either with or without
 25 leave to amend. Lopez v. Smith, 203 F.3d 1122, 1127, 1130 (9th Cir.
 26 2000) (en banc) (concluding that the PLRA did not strip district
 27 courts of this discretion). Because the language of § 1915(e)(2)
 28 parallels the language of Rule 12(b)(6), the Ninth Circuit has

1 suggested that there is no reason to depart from its longstanding
 2 policy that when dismissing a complaint for failure to state a
 3 claim, "a district court should grant leave to amend even if no
 4 request to amend the pleading was made, unless it determines that
 5 the pleading could not possibly be cured by the allegation of other
 6 facts." Id. at 1127.

7 **DISCUSSION**

8 The City of San Diego and the San Diego Police Department
 9 seek dismissal of Plaintiff's FAC based upon several alleged
 10 deficiencies in the pleadings. As an initial matter, Defendants
 11 argue that Plaintiff's FAC must be dismissed because his pleadings
 12 do not show compliance with applicable California Government Code
 13 sections¹, which require that all claims for money or damages
 14 against local public entities be presented to the public entities
 15 prior to commencement of any lawsuits. Defs.' Mem. at 3-4, 8-11.
 16 Further, Defendants submit that the dismissal should be with
 17 prejudice because the deadline for Plaintiff to present his claims
 18 to the City of San Diego has passed and cannot be revived by this
 19 Court, so Plaintiff cannot amend his pleadings to remedy this
 20 deficiency. Id. at 11-15. Defendants next argue that to the extent
 21 Plaintiff's claim is premised upon a violation of California's Penal
 22 Code, Plaintiff's claim must be dismissed with prejudice because the
 23 Penal Code does not create enforceable individual rights. Id. at
 24 15-16. Finally, Defendants contend that even if the Court finds
 25 that Plaintiff sufficiently plead compliance with the California

27 ¹ Collectively, these portions of the Government Code (Cal. Gov't Code
 28 § 810 et seq.) are known as California's Tort Claims Act. For purposes of
 clarity, the Court will use this term when referring to the applicable sections
 of the Government Code.

1 Government Code's claim presentation requirement, Plaintiff's claim
 2 still must be dismissed because Count 5 is time-barred. Id. at 16-
 3 20.

4 In response, Plaintiff acknowledges that his Opposition does
 5 not address each point raised by Defendants, but asks that the Court
 6 consider several arguments that weigh against granting Defendants'
 7 motion. Pl.'s Opp'n at 2. First, Plaintiff seeks permission from
 8 the Court to present late claims to the City of San Diego and the
 9 San Diego Police Department and thereafter amend his pleadings
 10 before this Court. Id. at 4. Second, Plaintiff cites to California
 11 Code of Civil Procedure section 358 in arguing that for individuals,
 12 like himself, who had two or more disabilities at the time the right
 13 of action accrued, the statute of limitations did not attach until
 14 the disabilities were removed.² Id. at 3. Third, Plaintiff relies
 15 upon California Civil Code sections 51 and 51.7 and argues that his
 16 action is subject to a three-year statute of limitation, not a two-
 17 year limitations period, as Defendants argue. Id. at 6. Finally,
 18 to the extent the Court is inclined to address Defendants' argument
 19 that Plaintiff's FAC is untimely, Plaintiff requests that the Court
 20 conduct a trial on this affirmative defense prior to deciding on the
 21 motion to dismiss. Id. at 7 (citing Cal. Code Civ. P. § 597).

22 Defendants rebut Plaintiff's arguments in their Reply and re-
 23 assert that Plaintiff's Count 5 must be dismissed with prejudice.
 24 In response to Plaintiff's mental disability allegations, Defendants
 25 argue that Plaintiff's "ability to commence and fully and
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27 ² Plaintiff claims to have two mental disabilities. Pl.'s Opp'n at 3.
 28 He attaches records in support of his claim but does not explicitly specify which
 disabilities he believes fall within the ambit of the state code.

1 impressively engage in the prosecution and defense of his action" 2 nullifies any mental disability defense. Defs.' Reply at 2. 3 Additionally, Defendants contend that in seeking relief from the 4 California Government Code's claim presentation requirement, 5 Plaintiff confuses the law relating to extensions of time for the 6 commencement and *filing of a legal action* with the law prohibiting 7 any extension for the *presentation of a claim* to a public entity in 8 advance of commencing a legal action. Id. at 3. In regard to the 9 other code sections Plaintiff cites, Defendants argue that none are 10 applicable to the operative complaint or have any bearing on the 11 relief sought in Defendant's motion to dismiss. Id. at 6.

12 In two subsequent filings by Plaintiff, which the Court 13 construed as sur-replies [Doc. Nos. 53 & 55], Plaintiff further 14 elaborates on his arguments. In his "Answer to Defendants' Reply to 15 Plaintiff's Opposition to Motion to Dismiss First Amended Complaint" 16 (hereinafter "Answer to Defendants Reply"), Plaintiff argues that 17 the date of accrual of his claim did not commence until March 2008 18 when he "emerged" from his "mentally disabled 'fog.'" Answer to 19 Defs.' Reply at 3. In his "Supplemental to Opposition to Motion to 20 Dismiss First Amended Complaint" (hereinafter "Supplemental 21 Opposition"), Plaintiff contends that California Code of Civil 22 Procedure section 338 (which provides for a three year limitations 23 period), not section 335.1, sets forth the applicable statute of 24 limitations. Suppl. Opp'n at 2. Additionally, Plaintiff submits 25 that he did not have to first present his claim to the appropriate 26 public entity because § 1983 claims are not subject to California's 27 Tort Claims Act. Id. at 3.

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A. Claims Alleging Violations of California's Penal Code

On page 3 of his FAC, Plaintiff alleges that the City of San Diego and the San Diego Police Department are liable for injuries proximately caused by their employees pursuant to "P.C. 815.2." FAC at 3. In Count 5, Plaintiff further alleges that the same Defendants violated "P.C. 245." *Id.* at 7.

Presuming Plaintiff's use of "P.C." refers to the California Penal Code, Defendants are correct that these allegations fail to state a claim. California's Penal Code does not create enforceable individual rights. Ellis v. City of San Diego, 176 F.3d 1183, 1189 (9th Cir. 1999) (affirming district court's dismissal of pro se plaintiff's claims against arresting officers where claims were based on alleged California Penal Code violations); c.f. Cal. Penal Code § 684 (West 2008) ("A criminal action is prosecuted in the name of the people of the State of California, as a party, against the person charged with the offense"). As such, Plaintiff has not stated a legally cognizable claim or one for which relief could be granted.³ See Jackson, 353 F.3d at 755.

Because Plaintiff's claims pursuant to the California Penal Code are legally barred, Plaintiff's claims also could not possibly be cured by amendment to his FAC and, thus, dismissal with prejudice is appropriate. Lopez, 203 F.3d at 1127, 1130. Accordingly, to the extent Plaintiff asserts claims against the City of San Diego and the San Diego Police Department premised upon California Penal Code violations, this Court **RECOMMENDS** that Defendants' motion be **GRANTED** and Plaintiff's claims be **DISMISSED WITH PREJUDICE**.

³ Additionally, as Defendant points out, the California Penal Code does not contain a section "815.2."

1 B. Plaintiff's Lack of Compliance With the California Tort
 2 Claims Act's Claim Presentation Requirement

3 At one point in Count 5, Plaintiff wrote "Cal. Penal Code
 4 815.2" and then crossed out "Penal" and inserted "Government." FAC
 5 at 7. He also paraphrased California Government Code section 815.2,
 6 which indicates that Plaintiff in fact is alleging that Defendants
 7 are liable under this code section. See Thompson, 295 F.3d at 895
 8 (explaining that the court must construe *pro se* pleadings
 9 liberally). Government Code section 815.2 provides as follows:

10 (a) A public entity is liable for injury proximately
 11 caused by an act or omission of an employee of the
 12 public entity within the scope of his employment if
 13 the act or omission would, apart from this section,
 14 have given rise to a cause of action against that
 15 employee or his personal representative.

16 (b) Except as otherwise provided by statute, a public
 17 entity is not liable for an injury resulting from an
 18 act or omission of an employee of the public entity
 19 where the employee is immune from liability.

20 Cal. Gov't Code § 815.2 (West 1995). Plaintiff explains that he
 21 believes the City of San Diego and the San Diego Police Department
 22 are vicariously liable under the doctrine of *respondeat superior*,
 23 and pursuant to Government Code section 815.2, for the acts of the
 24 arresting officers. FAC at 7.

25 Defendants submit that Plaintiff cannot pursue a civil action
 26 against them premised on Government Code section 815.2 because
 27 Plaintiff has not plead compliance with the California Tort Claims
 28 Act's claim presentation requirement. Defs.' Mem. at 3, 8.

25 1. The Requirements of the California Tort Claims Act

26 The California Tort Claims Act provides that "no suit for
 27 money or damages may be brought against a public entity on a cause
 28 of action for which a claim is required to be presented ... until a

written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board..." Cal. Gov't Code § 945.4⁴; Ovando v. County of Los Angeles, 159 Cal. App. 4th 42, 62-63 (2nd Dist. 2008) (confirming continued applicability of claim presentation requirement to those seeking money or damages from a local public entity); see also Cal. Gov't Code § 905 (imposing presentation requirement and listing limited exceptions, none of which are applicable to the facts of this case). The purpose of the claims presentation requirement is to afford public entities (1) the opportunity to remedy the condition giving rise to the injury (thus minimizing the risk of harm to others), (2) the time to investigate while evidence is still available, and (3) the chance to settle meritorious claims without incurring the cost of litigation. Shirk v. Vista Unified School Dist., 42 Cal. 4th 201, 213 (2007). In light of this overriding purpose, the requirement set forth in Government Code section 945.4 applies equally to individuals sentenced to imprisonment in a state prison. Cal. Gov't Code § 945.6(c).

The California Court of Appeal provided a thorough overview of the Tort Claims Act's presentation requirement in Doe v. Bakersfield City School District, 136 Cal. App. 4th 556 (5th Dist. 2006), explaining:

Under the Tort Claims Act, a person may not sue a public entity for personal injury or wrongful death unless he or she first presented a written claim to the public entity within six months following the accrual of the claim and the public entity rejected

⁴ The "board" referred to is the California Victim Compensation and Government Claims Board.

the claim. [Cal. Gov't Code] (§§ 911.2, 945.4; *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776, 39 Cal.Rptr.2d 860 (*Munoz*).) If a claim is presented late, the public entity, within a prescribed time, may send the claimant written notice that the claim is being returned without action due to its untimely presentation. In that instance, the claimant's only recourse is to apply for leave to present a late claim. (§ 911.3, subd. (a).)

A claimant has a period of one year from the accrual of the claim to present a written application to the public entity for leave to file a late claim. §§ 911.4, 911.6.) If the public entity denies leave to present a late claim, the claimant can petition the court under section 946.6 for an order relieving him or her of the requirement of presenting a claim. The court must relieve the petitioner from presentation and claim requirements if it finds the claimant's application under section 911.4 was made within a reasonable time, was denied or deemed denied under section 911.6, and the "failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section 945.4." (§ 946.6, subd. (c)(1).) In determining whether relief is warranted, the court will consider the petition, any supporting or opposing affidavits, and any other evidence presented at the hearing.

Bakersfield City School Dist., 136 Cal. App. 4th at 566-567.

Filing a late-claim application with a government entity within one year after the cause of action accrued is a jurisdictional prerequisite to a claim-relief petition under the Tort Claims Act. See Munoz, 33 Cal. App. 4th at 1779. In other words, if the underlying application to file a late claim was made more than one year after the cause of action accrued, the court is *without jurisdiction* to grant relief from the claim presentation requirement. Brandon G. v. Gray, 111 Cal. App. 4th 29, 34 (1st Dist. 2003); see also Ellis, 176 F.3d at 1190 (explaining that after the one-year deadline passes, the court has no discretion to grant applications). "Notwithstanding these rules, '[i]t is well settled

1 that a public entity may be estopped from asserting the limitations
2 of the claims statute where its agents or employees have prevented
3 or deterred the filing of a timely claim by some affirmative act.'"
4 Bakersfield City School Dist., 136 Cal. App. 4th at 567.

5 Because claim presentation is mandatory, failure to expressly
6 plead compliance with the claim presentation requirement subjects
7 the complaint to dismissal for failure to state a claim. California
8 courts repeatedly have explained that "submission of a claim to a
9 public entity pursuant to section 900 *et seq.* 'is a condition
10 precedent to a tort action and the failure to present the claim bars
11 the action.'" Phillips v. Desert Hospital Dist., 49 Cal. 3d 699,
12 708 (Cal. 1989) (quoting Lutz v. Tri-City Hospital, 179 Cal. App. 3d
13 807, 812 (4th Dist. 1986)); see also Del Real v. City of Riverside,
14 95 Cal. App. 4th 761, 767 (4th Dist. 2002) ("The filing of a claim
15 is a condition precedent to the maintenance of any cause of action
16 against the public entity and is therefore an element that a
17 plaintiff is required to prove in order to prevail"). If a
18 plaintiff nonetheless files a civil action but fails to allege facts
19 demonstrating or excusing compliance with the claim presentation
20 requirement, the complaint is subject to dismissal for failure to
21 state a cause of action. See State v. Superior Court (Bodde), 32
22 Cal. 4th 1234, 1239 (2004) (complaint subject to demurrer in state
23 court) and Burke v. City of El Cajon, 2007 WL 2915067, *6 (S.D. Cal.
24 2007) (recognizing that complaint subject to dismissal pursuant to
25 Fed. R. Civ. P. 12(b)(6) in federal court).

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1 2. Plaintiff's Arguments Pertaining to the Claim
 2 Presentation Requirement

3 On its face, Plaintiff's FAC does not contain any allegation
 4 suggesting that Plaintiff complied with the Tort Claims Act's claim
 5 presentation requirement or is entitled to be excused from complying
 6 with the same.⁵ In fact, in his Opposition Plaintiff acknowledges
 7 as much by seeking permission now to file an application to present
 8 a late claim. Pl.'s Opp'n at 4. As such, it appears Count 5 of
 9 Plaintiff's FAC does not include sufficient facts to state a claim
 10 for relief and that it, therefore, should be dismissed. Twombly,
 11 127 S.Ct. At 1974; see also Burke, 2007 WL 2915067 at *6.

12 Nonetheless, as noted above, Plaintiff presents several
 13 arguments against dismissal. Plaintiff's first argument, which he
 14 raises for the first time in his Supplemental Opposition, is that a
 15 § 1983 action is not subject to the Tort Claims Act. Suppl. Opp'n
 16 at 3-4. While it is true that claims against a public entity based
 17 on 42 U.S.C. § 1983 need not meet the requirements of the Tort
 18 Claims Act, see Felder v. Casey, 487 U.S. 131, 134 (1988),
 19 Plaintiff's allegations against the City of San Diego and the San
 20 Diego Police Department are premised upon violations of California

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22 ⁵ Even if the Court liberally construed Plaintiff's allegations in his
 23 FAC that he filed a "Citizen's Complaint" with the Internal Affairs Division of
 24 the San Diego Police Department (FAC at 8) as alleging compliance with the claim
 25 presentation requirement, Plaintiff's pleadings are insufficient. Plaintiff did
 26 not attach a copy of his Citizen's Complaint to the FAC, state the date on which
 27 the "Citizen's Complaint" was filed, or otherwise allege compliance with the six-
 28 month deadline. Additionally, the California Government Code requires that a
 claim be presented and acted upon by the public entity before a lawsuit may be
 filed. Cal. Gov't Code § 945.4. Plaintiff acknowledges in his FAC that he did
 not comply with this requirement in that he describes his Citizen's Complaint as
 "pending at present." FAC at 8. Furthermore, Plaintiff essentially concedes in
 his Opposition that he has not presented a proper claim to the appropriate public
 entity because he asks for relief from the claim presentation deadline or for the
 opportunity to file an application to present a late claim. See Pl.'s Opp'n at
 3-6.

1 Government Code section 815.2, see FAC at 7, for which claim
2 presentation is a prerequisite to suit. Count 5 plainly seeks to
3 impose *respondeat superior* liability on Defendants via Government
4 Code section 815.2 and Plaintiff cannot pursue that claim without
5 having complied with the Tort Claims Act's presentation requirement.
6 Moreover, it ultimately would not benefit Plaintiff to attempt to
7 convert Count 5 into a pure § 1983 claim because the Supreme Court
8 has long held that "a municipality cannot be held liable solely
9 because it employs a tortfeasor-or, in other words, a municipality
10 cannot be held liable under § 1983 on a *respondeat superior* theory."
11 Monell v. Dep't of Soc. Serv. of City of New York, 436 U.S. 658,
12 691-692 (1978). Therefore, Plaintiff's first argument fails to
13 alter this Court's finding that Count 5 should be dismissed.

14 Plaintiff's other arguments to avoid dismissal are likewise
15 unavailing. For instance, Plaintiff attempts to rely upon
16 California Code of Civil Procedure section 358 and Government Code
17 section 945.6(b) to excuse his failure to comply with the Tort
18 Claims Act's presentation requirement. Pl.'s Opp'n at 3-6. However,
19 these statutes do not address nor excuse a failure to present a
20 claim to a public entity; they merely provide possible relief for
21 failure to timely file suit. Accordingly, the Court remains
22 convinced that Count 5 should be dismissed for failure to state a
23 claim based upon Plaintiff's failure to comply with the Tort Claims
24 Act's claim presentation requirement. The question is whether the
25 dismissal should be with or without prejudice.

26 The Court will construe Plaintiff's remaining arguments as
27 requests that the dismissal be without prejudice. See Thompson, 295
28 F.3d at 895 (court must construe *pro se* pleadings liberally).

1 Plaintiff argues that he should be excused from complying with the
2 presentation requirement because he suffers from mental disabilities
3 and the failure was the result of these disabilities or excusable
4 neglect. Alternatively, Plaintiff argues that the Court should find
5 that the claim did not begin to accrue (or the limitations period
6 should be tolled) until his mental disability abated. Pl.'s Opp'n at
7 3-6. Under either scenario, Plaintiff requests additional time to
8 present his claim to the Defendants and the ability to then amend
9 his federal complaint.

10 a. **Relief Based on Excusable Neglect and/or Alleged**
11 **Physical and Mental Incapacity**

12 Plaintiff first argues that the Court should provide him with
13 relief pursuant to Government Code section 946.6(c). Pl.'s Opp'n at
14 3-6. Government Code section 946.6(c) provides that a court may
15 provide relief from the requirements of section 945.4 if "[t]he
16 failure to present the claim was through mistake, inadvertence,
17 surprise, or excusable neglect" or "[t]he person who sustained the
18 alleged injury, damage or loss was physically or mentally
19 incapacitated during all of the time specified in section 911.2 for
20 the presentation of the claim and by reason of that disability
21 failed to present a claim during that time." Cal. Gov't Code
22 § 946.6(c). Plaintiff claims that his failure was due both to
23 excusable neglect and to physical and mental incapacity. FAC at 5.
24 However, section 946.6(c) makes clear that courts may only grant
25 relief if the plaintiff first filed an application to submit a late
26 claim within a year of the accrual date and the claim was denied.
27 Cal. Gov't Code § 946.6(c) ("The court shall relieve the petitioner
28 from the requirements of Section 945.4 if the court finds that the

1 application to the board under Section 911.4 was made within a
2 reasonable time not to exceed that specified in subdivision (b) of
3 Section 911.4 [one year] and was denied or deemed denied..."); see
4 also Munoz, 33 Cal. App. 4th at 1779. Because Plaintiff makes no
5 allegation that he filed an application to submit a late claim, this
6 Court cannot provide Plaintiff with any relief pursuant to section
7 946.6(c) and it does not provide a basis for dismissing Count 5
8 without prejudice.

b. Relief Arising From Allegedly Delayed Accrual Date

10 Alternatively, Plaintiff submits that this Court should
11 exercise its jurisdiction and allow him leave to amend his pleadings
12 because his claim did not actually accrue until March 2008.⁶ Answer
13 to Defs.' Reply at 2-3. Specifically, Plaintiff contends that:

14 the date of accrual must not commence on the date of
15 the complained incident, but rather on the date that
16 he "became aware or reasonably should have been aware"
17 that tortious conduct had occurred, which in the
18 instant case would be March 2008 when he "emerged"
from his mentally disabled "fog" and was able to
conduct coherent, linear, cogent, deductive reasoning
with clarity, i.e. he was no longer non compos mentis
(in toto).

19 Answer to Defs.' Reply at 3. Plaintiff's argument suggests that
20 even if Count 5 is dismissed, the dismissal should be without
21 prejudice because if the claim accrued in March 2008, the one-year
22 period for applying for leave to file a late claim would not expire
23 until March 2009. Thus, Plaintiff would have time to submit an

1 application to file a late claim, obtain a decision from the public
 2 entity or waiver from the court, and then cure his pleadings by
 3 alleging compliance with the Tort Claims Act.

4 The Court rejects Plaintiff's argument. Under California
 5 law, a cause of action generally accrues "at the time when the cause
 6 of action is complete with all of its elements." Grisham v. Philip
7 Morris U.S.A., Inc., 40 Cal. 4th 623, 634 (2007) (quoting Fox v.
8 Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797, 806-807 (2005)). In
 9 Count 5, Plaintiff alleges that Defendants are responsible for the
 10 misconduct of their employees. FAC at 7. The alleged misconduct of
 11 Defendants' employees is that the arresting officers used excessive
 12 force in violation of the Fourth Amendment. Id. at 4-6.

13 To establish a claim for excessive force, Plaintiff must
 14 establish that (1) the officer was acting under the color of law,
 15 that is, he was performing his official duties, (2) he used
 16 excessive force in performing those duties, and (3) the officer's
 17 acts were the proximate cause of damages sustained by Plaintiff. 3B
 18 Fed. Jury Prac. & Instr. §§ 165.20 & 165.40 (5th ed.). "[A]ll
 19 claims that law enforcement officers have used excessive
 20 force—deadly or not—in the course of an arrest, investigatory stop,
 21 or other 'seizure' of a free citizen should be analyzed under the
 22 Fourth Amendment and its 'reasonableness' standard." Graham v.
23 Connor, 490 U.S. 386, 395 (1989). Thus, the elements of Plaintiff's
 24 claim are that officers used unreasonable force in arresting him.

25 Plaintiff alleges in his FAC that, on March 9, 2006, Officer
 26 Wilson, "a uniformed officer, driving [a] marked patrol car,"
 27 approached him and "gripped [his] throat" and "bang[ed] [his]
 28 forehead into [the] concrete sidewalk." FAC at 4. He further

1 alleges that Officer Tagaban, "also in uniform and driving [a]
 2 marked squad car," "beat[] [his] head and left shoulder with [a]
 3 metal 2 foot flashlight with batteries installed" numerous times
 4 until he lost consciousness. Id. at 4-5. Thereafter, Plaintiff
 5 describes his arrest and conviction. Id. at 5. The FAC does not
 6 describe any conduct that occurred on any date other than March 9,
 7 2006. Accordingly, Plaintiff's FAC clearly states that all of the
 8 alleged wrongs occurred on March 9, 2006 and Plaintiff's claims,
 9 therefore, accrued on March 9, 2006.⁷

10 In his supplemental pleadings, Plaintiff argues that he was
 11 in a "mentally disabled 'fog'" and that the accrual date should be
 12 delayed until March 2008, when he "emerged" from that "fog." Ans.
 13 to Defs.' Reply at 3; Suppl. Opp'n at 5. The law does provide that
 14 "[a]n important exception to the general rule of accrual is the
 15 'discovery rule,' which postpones accrual of a cause of action until
 16 the plaintiff discovers, or has reason to discover, the cause of
 17 action." Grisham, 40 Cal. 4th at 634. "A plaintiff has reason to
 18 discover a cause of action when he or she 'has reason at least to
 19 suspect a factual basis for its elements.'" Id.

20 While it is unclear the degree of mental incapacity necessary
 21 to delay accrual of a claim, the Court finds persuasive the
 22 standards applied in similar claim presentation circumstances. For
 23 instance, to justify tolling of the one-year late claim application
 24 deadline pursuant to California Government Code section 911.4(c)(1),

25
 26 ⁷ The analysis would be the same under the state standard described in
 27 California Code of Civil Procedure section 335.1 (applying to claims of "assault,
 28 battery or injury to ... an individual caused by the wrongful act or neglect of
 another"). Plaintiff alleges that he was battered and injured by Officers Wilson
 and Tagaban and that their conduct was wrongful.

1 a plaintiff must demonstrate evidence that he is "mentally
2 incapacitated." Santee v. Santa Clara County Office of Educ., 220
3 Cal. App. 3d 702, 717 (6th Dist. 1990). Moreover, it is the
4 petitioner's burden to make such a showing by a preponderance of the
5 evidence. Id. (citing Tammen v. County of San Diego, 66 Cal. 2d
6 468, 474 (1967)). Similarly, in analyzing application of California
7 Government Code section 946.6 (which allows a plaintiff to seek
8 relief from the court if a timely application to file a late claim
9 is denied by the public entity), the California Supreme Court has
10 explained:

11 The subdivision is designed to assure both that the
12 claimant was disabled during the filing period and
13 that the disability was the reason the claimant could
14 not file timely. A person can be disabled yet be able
15 to file a timely claim. The decisions construing
subdivision (c)(3) and its predecessor apply the
disability provision in just this way: they analyze
the extent of the injured person's disability and
determine whether it was so great as to preclude
filing a timely claim or authorizing someone to do so.
16

17 Draper v. City of Los Angeles, 52 Cal.3d 502, 509 (1990). These
18 sections demonstrate a legislative intent that (1) the disability
19 rise to the level of "mental incapacity," (2) the burden of
20 demonstrating mental incapacity falls on the party seeking relief
21 and must be shown by a preponderance of the evidence, and (3) the
22 claimant must show that the disability was the reason the claimant
23 could not file in a timely manner. Plaintiff has not satisfied this
24 burden.

25 Initially, Plaintiff does not allege that he did not discover
26 the claim or the factual basis for it until March 2008. FAC at 1-7.
27 Second, the fact that Plaintiff subsequently was prosecuted for, and
28 convicted of, the crimes that led up to the March 9, 2006 arrest

1 indicates that Plaintiff was competent and aware of the factual
2 basis for the current claims, the alleged illegal arrest on March 9,
3 2006. Finally and most importantly, the medical records that
4 accompany Plaintiff's Opposition do not support Plaintiff's argument
5 that he was in a "mentally disabled fog" that prevented him from
6 understanding the factual basis of his claims and filing an
7 appropriate claim.

8 Plaintiff submitted medical records covering the period of
9 March 2006 through July 2007 and from an appointment on March 20,
10 2008. Pl.'s Opp'n at 19-82. The 2006 and 2007 records show that
11 Plaintiff experienced headaches and depression, at times expressed
12 suicidal ideations, and was treated with anti-depressants. Id. at
13 20, 28-80. The records also indicate several medical visits in
14 which Plaintiff reported that he was asymptomatic and that his
15 outlook on life improved when he was taking Zoloft and other
16 medication. Id. at 42, 44, 50, 76. However, the records do not
17 contain any complaints or indications that Plaintiff was
18 experiencing a "mentally disabling fog" or did not understand what
19 was going on around him. Id. at 20, 28-80. And, none of the
20 physician notes or other records reflect any concerns regarding
21 competency, an inability to understand what was happening around or
22 to him, or an inability to perform important tasks such as filing a
23 claim. Id. The records also reflect that Plaintiff complained
24 about being beat up by the police in 2006. Id. at 45, 70, 75, 78.
25 The March 20, 2008 records reflect that Plaintiff was not currently
26 experiencing any medical symptoms but that he wanted to see a
27 psychiatrist to determine whether his past head injuries contributed
28 to his past criminal conduct. Id. at 21-23, 25-26. Accordingly,

1 the medical records establish that Plaintiff was competent, was able
 2 to perform important tasks, such as filing a claim, and knew that he
 3 had been arrested and believed that the officers had used excessive
 4 and unreasonable force in doing so. The records do not support
 5 Plaintiff's claim that he had a mental disability that prevented him
 6 from filing a timely claim.

7 The Court finds that Plaintiff's allegations of having been
 8 in a "mentally disabled fog" do not satisfy his burden of showing by
 9 a preponderance of the evidence that his alleged disability rose to
 10 the level of mental incapacity, nor do they demonstrate how the
 11 "mentally disabled fog" actually prevented him from presenting his
 12 claim in a timely manner. See Santee, 220 Cal. App. 3d at 717;
 13 Draper, 52 Cal.3d at 509. Therefore, the Court rejects Plaintiff's
 14 argument that his claim did not accrue until March 2008 and his
 15 attendant argument that Count 5 must be dismissed without
 16 prejudice.⁸

17 **3. Conclusion Regarding Dismissal for Failure to Comply**
with California's Tort Claims Act

19 In sum, because "submission of a claim to a public entity
 20 pursuant to section 900 *et seq.* 'is a condition precedent to a tort
 21 action and the failure to present the claim bars the action,'"
 22 Phillips, 49 Cal. 3d at 708, Plaintiff's failure to present the
 23 allegations against Defendants described in Count 5 bars suit on
 24 that claim. As such, dismissal of Count 5 is appropriate. Burke,
 25 2007 WL 2915067, at *6. Further, because it is apparent that

27 ⁸ For the same reasons, the Court also rejects Plaintiff's argument to
 28 the extent he asserts that the deadline for filing a late claim should be tolled
 due to his claimed mental deficiencies.

1 Plaintiff did not present a claim to the appropriate public entity
 2 or timely apply for leave to present a late claim, and because it
 3 now is too late for Plaintiff to do so, Plaintiff could not possibly
 4 cure his FAC by alleging other facts. See Lopez, 203 F.3d at 1127.
 5 Accordingly, this Court finds that it would be futile to grant
 6 Plaintiff leave to amend Count 5 and, therefore, **RECOMMENDS** that
 7 Defendants' motion be **GRANTED** and Count 5 against the City of San
 8 Diego and the San Diego Police Department be **DISMISSED WITH**
 9 **PREJUDICE.**

10 **C. The Statute of Limitations**

11 Defendant argues that Plaintiff's claims in Count 5 also are
 12 barred by the two-year statute of limitations set forth in
 13 California Code of Civil Procedure section 335.1. Defs.' Mem. at
 14 16. Since Plaintiff's allegations arise from Officers Wilson and
 15 Tagaban's alleged use of excessive force on March 9, 2006, and
 16 Plaintiff did not file his FAC until June 19, 2008, Defendants
 17 contend that Count 5 is time-barred. Id.

18 Plaintiff counters that the Court should apply California
 19 Code of Civil Procedure section 338, which provides for a three-year
 20 statute of limitations on actions premised "upon a liability created
 21 by statute" [Cal. Code Civ. Pro. § 338(a)].⁹ Pl.'s Opp'n at 6.
 22 Plaintiff also requests that, because untimeliness is an affirmative
 23 defense, the Court conduct a separate trial on all special defenses
 24 prior to deciding the instant motion to dismiss. Pl.'s Opp'n at 7.

25 Because 42 U.S.C. § 1983 does not contain a specific statute

26
 27 ⁹ Plaintiff also cites California Civil Code sections 51 and 51.7 as
 28 providing a three-year time limit for commencing civil actions. FAC at 6.
 However, neither section lists a statute of limitations nor creates enforceable
 individual rights.

1 of limitations, the Court looks to the statute of limitations for
 2 personal injury actions in the forum state. Maldonado v. Harris,
 3 370 F.3d 945, 954 (9th Cir. 2004). Under California law:

4 To determine the statute of limitations which applies
 5 to a cause of action it is necessary to identify the
 6 nature of the cause of action, i.e., the 'gravamen' of
 7 the cause of action. [T]he nature of the right sued
 8 upon and not the form of action nor the relief
 9 demanded determines the applicability of the statute
 10 of limitations under our code.

11 Marin Healthcare Dist. v. Sutter Health, 103 Cal. App. 4th 861,
 12 874-875 (3rd Dist. 2002) (quoting Hensler v. City of Glendale, 8
 13 Cal. 4th 1, 22-23 (1994)). Here, the "gravamen" of Plaintiff's FAC
 14 is Plaintiff's assertion that he was injured as a result of Officers
 15 Wilson and Tagaban's use of excessive force. Therefore, section
 16 335.1, which addresses personal injury actions, dictates the
 17 applicable statute of limitations, not section 338, which provides
 18 only the statutory authority for asserting that Defendants are
 19 vicariously liable for the officers' actions. See Burke, 2007 WL
 20 2915067 at *3 (rejecting argument that statute of limitations under
 21 section 338 instead of section 335.1 applies to a vicarious
 22 liability claim against a city based upon personal injuries
 23 inflicted by one of its officers).

24 Applying the two-year statute of limitations, it appears that
 25 Plaintiff's claim is, in fact, time-barred. As previously
 26 discussed, Plaintiff's claim accrued on the date of his arrest,
 27 March 9, 2006. Plaintiff, therefore, had until March 8, 2008, to
 28 file a civil action against the City of San Diego and the San Diego
 Police Department. While Plaintiff filed his original federal
 complaint on March 3, 2008, he did not amend his complaint to add
 claims against the City of San Diego and the San Diego Police

1 Department until June 19, 2008.¹⁰ Thus, unless Plaintiff
2 demonstrates that Count 5 relates back to the original complaint,
3 Plaintiff's claims against the City of San Diego and the San Diego
4 Police Department are untimely as a matter of law.

5 Defendants argue that Plaintiff is not entitled to benefit
6 from the relation-back doctrine. Defs.' Mem. at 16-17. Rule 15 of
7 the Federal Rules of Civil Procedure provides that an amendment to
8 a pleading may relate back to the date of the original pleading when
9 "the law that provides the applicable statute of limitations allows
10 relation back."¹¹ Fed. R. Civ. P. 15(c)(1)(A). In this case,
11 California law provides the applicable statute of limitations, so
12 this Court looks to California's policy regarding relation back. In
13 California, "[t]he general rule is that an amended complaint that
14 adds a new defendant does not relate back to the date of filing the
15 original complaint and the statute of limitations is applied as of
16 the date the amended complaint is filed, not the date the original
17 complaint is filed." Woo v. Superior Court, 75 Cal. App. 4th 169,
18 176 (4th Dist. 1999) (citing Liberty Transport, Inc. v. Harry W.
19 Gorst Co., 229 Cal. App. 3d 417, 428 (2nd Dist. 1991), disapproved

10 Plaintiff first moved to amend his complaint on April 30, 2008. Doc.
11 No. 18. This date also falls beyond the two-year statute of limitations.

1 on other grounds in Adams v. Murakami, 54 Cal. 3d 105, 115-116
2 (1991)). "A recognized exception to the general rule is the
3 substitution under [California Code of Civil Procedure] section 474
4 of a new defendant for a fictitious Doe defendant named in the
5 original complaint as to whom a cause of action was stated in the
6 original complaint." Id. Only if the requirements of section 474
7 are satisfied can the amended complaint substituting a new defendant
8 for a fictitious Doe defendant and filed after the statute of
9 limitations has expired be deemed filed as of the date the original
10 complaint. Id. (citing Austin v. Mass. Bonding & Ins. Co., 56 Cal.
11 2d 596, 599 (1961)).

12 In this case, though Plaintiff has not squarely addressed the
13 relation-back issue, the Court finds it appropriate to consider
14 briefly whether it would apply to Count 5. California law requires
15 Plaintiff to have listed Doe defendants in his original complaint in
16 accordance with California Code of Civil Procedure section 474. Id.
17 Section 474 allows the use of Doe defendants "[w]hen the plaintiff
18 is ignorant of the name of a defendant." Cal. Code Civ. P. § 474.
19 The amended pleading may then substitute a named defendant for a Doe
20 defendant "when [the defendant's] true name is discovered." Id.
21 Here, Plaintiff did not name any Doe defendants in his original
22 complaint and he did not allege the substance of Count 5. He also
23 cannot plausibly claim that, at the time he filed his original
24 complaint, he was ignorant of the names of the City of San Diego and
25 the San Diego Police Department, since he listed all of the
26 individual defendants as "San Diego Police" officers, sergeants or
27 detectives and alleged that he filed a Citizen's Complaint with the
28 San Diego Police Department. Compl. at 2, 6. Accordingly, the

1 Court finds that Plaintiff has neither sought the benefit of, nor
 2 satisfied the requirements for, California's relation-back doctrine.
 3 The allegations against the City of San Diego and the San Diego
 4 Police Department, contained in Count 5 of the FAC, therefore, do
 5 not relate back to the date of the original complaint. Woo, 75 Cal.
 6 App. 4th at 176.

7 To the extent Plaintiff seeks equitable relief, in the form
 8 of tolling of the statute of limitations, due to his mental issues
 9 and incarceration, the Court finds Plaintiff's arguments
 10 unpersuasive. For the same reasons discussed previously in regard
 11 to the claim presentation requirement, the Court finds that
 12 Plaintiff has not plead facts demonstrating that his mental illness
 13 was so debilitating that it prevented him from being able to comply
 14 with the statute of limitations. The fact that Plaintiff is
 15 incarcerated also does not entitle him to tolling because California
 16 Penal Code section 2601 expressly provides prisoners the right to
 17 initiate civil actions and Plaintiff has not alleged that he was
 18 prevented from taking advantage of this right.¹² See Cal. Penal Code
 19 § 2601. Accordingly, tolling does not save Plaintiff's action from
 20 being untimely.

21 For the foregoing reasons, the Court finds that Count 5 of
 22 Plaintiff's FAC is untimely. The Court, therefore, **RECOMMENDS** that
 23 Defendants' motion, alternatively, be **GRANTED** on this basis and
 24 Count 5 against the City of San Diego and the San Diego Police

25
 26
 27 ¹² Plus, of course, Plaintiff was able to initiate his *federal action*
 28 within the two-year limitations period - he simply failed to include Defendants
 at that time.

1 Department be **DISMISSED**.¹³

2 **CONCLUSION**

3 For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the
4 District Court issue an Order: (1) approving and adopting this
5 Report and Recommendation and (2) granting Defendants' Motion to
6 Dismiss the City of San Diego and the San Diego Police Department
7 and Count 5 of Plaintiff's FAC.

8 **IT IS HEREBY ORDERED** that any written objections to this
9 Report must be filed with the Court and served on all parties **no**
10 **later than November 14, 2008**. The document should be captioned
11 "Objections to Report and Recommendation."

12 **IT IS FURTHER ORDERED** that any reply to the objections shall
13 be filed with the Court and served on all parties **no later than**
14 **December 5, 2008**. The parties are advised that failure to file
15 objections within the specified time may waive the right to raise
16 those objections on appeal of the Court's order. See Turner v.
17 Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

18 DATED: October 23, 2008

19 

20 BARBARA L. MAJOR
21 United States Magistrate Judge
22
23

24 ¹³ The Court also denies Plaintiff's request that the Court conduct a
25 trial on Defendants' statute of limitations affirmative defense prior to deciding
26 the motion to dismiss. See Pl.'s Opp'n at 7. As an initial matter, Plaintiff's
27 authority for his request is California Code of Civil Procedure § 597 and this
28 Court's conduct is not governed by California's procedural rules. Furthermore,
the Supreme Court has confirmed that even though the statute of limitations is
raised as an affirmative defense, if the allegations of the complaint "show that
relief is barred by the applicable statute of limitations, the complaint is
subject to dismissal for failure to state a claim." Jones v. Bock, 549 U.S. 199,
127 S.Ct. 910, 920-21 (2007).

1 COPY TO:

2 HONORABLE WILLIAM Q. HAYES
3 UNITED STATES DISTRICT JUDGE

4 ALL COUNSEL AND PARTIES

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